BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

STEVEN ROUSSERT	)	
Claimant	)	
V.	)	
	)	
B/E AEROSPACE, INC.	)	Docket No. 1,069,096
Respondent	)	
AND	)	
	)	
TRUMBULL INSURANCE CO. INC.	)	
Insurance Carrier	)	

ORDER

Claimant, through Timothy M. Alvarez, requested review of Administrative Law Judge William G. Belden's November 12, 2015 Award. Michael R. Kauphusman appeared for respondent and insurance carrier (respondent). The Board heard oral argument on March 22, 2016.

RECORD AND STIPULATIONS

The Board has carefully considered the record and adopted the Award's stipulations. At oral argument, the parties stipulated that if the case is compensable, claimant's permanent partial disability (PPD) benefits should be computed using 110 weeks under the schedule based on his bilateral ear impairment and not calculated after converting his ear impairment to a smaller body as a whole figure.

ISSUES

Claimant alleged hearing impairment from exposure to loud noises while working for respondent for over two decades. The judge concluded claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment on February 18, 2014, and awarded him a 6% whole body impairment for hearing loss.

Claimant contends the judge incorrectly converted his percentage of binaural hearing loss to a smaller whole body impairment. Claimant contends he sustained a 21.75% binaural hearing loss at the 110 week level, but requests all other findings be affirmed.

Respondent requests the Award be reversed, arguing claimant failed to prove he sustained personal injury by repetitive trauma arising out of and in the course of his employment. Respondent contends claimant's hearing loss was caused by non-occupational noise exposure. In the alternative, respondent requests the Award be limited to PPD benefits based on a 6% impairment rating.

The issues are:

1. Did claimant's injury by repetitive trauma arise out of and in the course of his employment, including whether the alleged repetitive trauma was the prevailing factor causing his alleged injury, medical condition, need for treatment and resulting disability or impairment?

2. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Respondent builds items for airplane galleys or interiors. Claimant, 59 years old, started working for respondent in Florida in January 1991. While in Florida, claimant worked in two main areas: spot welding, where he performed welding and deburring during his first two years, and thereafter in sheet metal fabrication. The spot welding area was steadily noisy due to constantly running water coolers, and tumblers and burnishers that ran nearly constantly. Such area was loud enough that claimant could only communicate with other workers by raising his voice. The sheet metal fabrication shop contained a turret press punch that was "pretty loud" and similar to "hitting a hammer" on a piece of metal, with the sound varying based on the thickness of the metal.[1] Claimant also operated other machinery, such as a different punch press and a press brake, the latter being quiet when used. Claimant testified he wore ear plugs around the punch press and started wearing ear protection as a spot welder.

In 2002, respondent shut down the Florida plant and claimant was transferred to its plant in Lenexa. He testified the work environment in Lenexa was louder than in Florida. In Lenexa, he worked in the fabrication shop. Claimant estimated he spent 75% of his work in the general fabrication room and deburring area just outside of a grinding room, where he worked approximately one week a month. The grinding room was closed off by separate walls, a ceiling and swinging doors. The grinding room contained multiple big and small grinders and polishing machinery which produced constant noise. Claimant testified he tried to wear hearing protection when he worked in the grinding room.

Respondent provided a tub of earplugs for employees. Claimant testified respondent never told him to wear hearing protection, but he took it upon himself to wear ear plugs almost all the time when operating heavy, loud-pounding machines. He indicated on busy days, it was not unusual for him to spend five hours of his day operating the punch press. At one point, respondent put a giant cover over the turret punch press because office employees in an adjacent room complained about noise. Claimant testified this decreased the noise for the office workers, but increased the noise level in his area because it started coming out of one single opening and not the whole machine.

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[1] R.H. Trans. at 19-21.

Claimant alleged he sustained hearing loss and ringing in his ears due to work-related noise exposure. He did not know when he first noticed his hearing loss. Claimant thought he may have had the ringing sensation when he moved to Kansas in 2002.

Claimant could not recall if he had any hearing tests while in Florida, but denied ever receiving treatment for hearing loss. While working for respondent in Kansas, claimant was required to submit to regular hearing tests at Corporate Care. Corporate Care administered hearing tests on August 23, 2013, September 27, 2013 and October 17, 2013, which were interpreted as abnormal.

On November 26, 2013, claimant saw his primary care physician, Darrin Davis, D.O., who noted a history of claimant failing a hearing test at work. Dr. Davis referred claimant to Brian Metz, M.D., an ear, nose and throat specialist, who saw claimant on December 12, 2013. Dr. Metz performed a hearing test and diagnosed claimant with bilateral mild to moderate sensorineural hearing loss. According to claimant, he was referred to the Otologic Center.

Claimant was first told he had hearing loss from long-term and steady sound, possibly work related, at the Otologic Center on February 18, 2014. That day, claimant advised respondent what he was told by the Otologic Center and that he wanted to make a workers compensation claim.

Before working for respondent, claimant worked over 12 years at three separate employers: five years for Mazzoni Farms, five years for Beach Cleaning and two years for the City of Delray. A May 9, 2008 audio testing form, requested by respondent, stated claimant was exposed to noise at the three prior employers, but claimant only had ear protection for the City of Delray. The form also noted claimant had noisy hobbies and was exposed to loud music/headphones. However, claimant testified he wore hearing protection if exposed to loud noises for all three employers. Additionally, while claimant admitted to listening to music with headphones, he indicated it was not loud and was at a volume that was comfortable to his ears. Claimant also noted on the form that he wore a helmet for motorcycle racing and wore hearing protection during drag racing.

Claimant testified he engaged in hobbies that exposed him to loud noises. While in Florida, claimant attended a three-day drag race nearly every year from 1980 until 2002, but said he probably did not attend the event some years. Of the 12 years claimant lived in Kansas, he attended a one-day drag race on five occasions. Claimant testified he always wore hearing protection when attending drag races. When he was 14 or 15, he participated in three or four motorcycle races and wore a full-faced helmet which muffled the sound. Claimant also fabricated parts for other people a “handful” of times during his breaks at respondent’s shop using the quiet brake press. If he worked on car motors, he testified he always wore hearing protection. When questioned about the noise comparison between his hobbies and work, claimant testified his exposure to noise at work greatly exceeded noises he was exposed to outside of work.

During the time claimant worked for respondent in Kansas, he also worked part-time at Home Depot as a cashier for nine years. He generally denied any exposure to loud noise while working at Home Depot.

Claimant last worked for respondent on June 30, 2014. Claimant is not currently working, but has not retired. In January 2015, he moved back to Florida and is obtaining a welding certificate. After leaving respondent, his hearing loss and ringing sensation have continued. He strives to pay closer attention to understand what people are saying.

Two medical experts testified. Both experts indicated claimant had noise-induced hearing loss and did not have age-related or genetic hearing loss.

At his attorney's request, claimant saw Peter Bieri, M.D., an ear, nose and throat doctor who is board certified in disability evaluations, on May 27, 2014. Dr. Bieri noted claimant had no family history of hearing loss and no significant non-occupational noise exposure.

Dr. Bieri's physical examination showed no abnormal objective findings. The doctor performed a tuning fork examination which, while subjective, was consistent with bilateral sensorineural hearing loss. Dr. Bieri did not perform an audiogram. Dr. Bieri diagnosed claimant with bilateral sensorineural hearing loss and tinnitus. In addressing causation, Dr. Bieri testified:

> Q. . . . What's more likely to produce a hearing loss, acute loud noises or chronic long term noise like working in a factory environment?
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> A. Oh, with his findings the chronic long term noise, no doubt about it.
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> Q. And why do you say that?
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> A. It's symmetrical, it's located on both ears. Isolated gunfire or acoustic incident usually occurs on one side or the other. He has a history of sound exposure that's consistent with his occupation. All the factors are consistent there.[2]

Dr. Bieri gave claimant a 16.9% binaural hearing impairment which converted to a 6% whole person functional impairment, using Table 3, page 228, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (hereafter *Guides*). Dr. Bieri recommended hearing aid evaluation and testified claimant's future medical treatment will consist of hearing aid replacements every three to five years, batteries and audiograms. Dr. Bieri also indicated claimant will require removal of wax accumulation and treatment for possible skin ear infection or irrigation due to wearing hearing aids.

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[2] Bieri Depo. at 45.

Dr. Bieri opined claimant's exposure to industrial noise while working for respondent was the primary factor in causing claimant's medical condition and disability.

Dr. Bieri was not very familiar with OSHA noise regulations, but acknowledged OSHA states an employer shall provide hearing protection if workplace noise exposure levels exceed 85 dB. Dr. Bieri was unaware of any specific scientific knowledge that definitively shows that following OSHA's regulations regarding noise exposure and ear protection would prevent occupational hearing loss.

While Dr. Bieri admitted it is possible claimant could have experienced hearing loss even without exposure to industrial noise, he believed it was unlikely. Additionally, Dr. Bieri indicated if claimant sustained hearing loss from prior employment noise exposure, he would have expected the hearing loss to manifest earlier than 23 years later.

At respondent's request, on February 2, 2015, claimant saw Gregory A. Ator, M.D., a board certified otolaryngologist who is an associate professor at the University of Kansas Medical Center for both the Department of Otolaryngology and the Department of Hearing and Speech. Dr. Ator noted a history of claimant performing sheet metal work for respondent. Dr. Ator understood claimant wore hearing protection for certain tasks, but not for shop noise.

Dr. Ator's physical examination revealed no objective findings. Dr. Ator diagnosed claimant with bilateral sensorineural hearing loss caused by noise exposure. The doctor opined claimant's hobbies and non-occupational exposures (including attending drag racing and racing motorcycles) were the major contributors to his hearing loss, not the occupational noise claimant encountered at respondent.

Dr. Ator provided claimant a 26.6% binaural hearing impairment which converted to a 9% whole person functional impairment using the *Guides*.

Dr. Ator testified exposure to noise and duration of exposure can cause hearing loss. He noted that a "super loud sound for a very short period of time is injurious" and a "medium sound for a longer period of time has an equal injury capability."[3]

Respondent occasionally had claimant wear a microphone and box to assess noise levels. Dr. Ator reviewed a report concerning the noise levels in claimant's work area. The average noise level was 82.7 dB, the time weighted average was 82.4 dB and the loudest noise was 142.8 dB. Dr. Ator testified the time-weighted average of noise level in claimant's work area measured below what OSHA considers injurious exposure. Dr. Ator indicated even if claimant was exposed to noise levels above OSHA's time-weighted average for injurious exposure about 25% of the time, it would not change his opinion.

[3] Ator Depo. at 26.

Dr. Ator testified it was unlikely that constant noise exposure below 85 dB could cause hearing loss and due to genetics, some people are injured at lower noise level exposure. According to site testing, the noise level in the grinding room was 85.1 decibels (dB).[4] Dr. Ator acknowledged he did not have the reading for the fabrication grind room when he prepared his report.

The doctor testified it was "most important" that claimant attended drag racing for three out of 12 years.[5] Dr. Ator also did not know how often claimant attended drag racing, but testified he believed claimant attended regularly, which he would consider "every weekend" and "all day."[6] While his report stated claimant worked for respondent from 1991 until 2014, Dr. Ator testified claimant worked 12 years total for respondent.

On pages 8 and 9 of the November 12, 2015 Award, the judge stated:

> The primary issue in this matter is whether Claimant met his burden of proving he met with personal injury, manifested by hearing loss and tinnitus, from repetitive trauma arising out of and in the course of his employment with Respondent.
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> . . .
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> Claimant testified he was exposed to elevated noise levels at work . . . . Claimant's testimony was uncontradicted. Instead, Respondent suggests the elevated noise levels documented in the noise level study were not injurious because they mostly fell below the threshold OSHA established to obligate employers to provide hearing protection. The Court notes some of the noise levels documented in Exhibit 3 from Dr. Ator's deposition exceed 85 dB, and Dr. Ator acknowledged that due to biological variability, noise levels below 85 dB may be injurious to some. The Court finds Claimant's work environment did expose Claimant to elevated noise levels on a repetitive basis. The Court also notes objective testing revealed Claimant sustained hearing loss, and both Dr. Ator and Dr. Bieri agree Claimant's hearing loss was noise-induced.
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> The Court next considers whether Claimant's work-related noise exposure at Respondent was the primary factor, compared to any other factor, producing Claimant's noise-induced hearing loss and tinnitus. Dr. Bieri thought Claimant's occupational noise exposure was the prevailing factor causing Claimant's hearing loss and tinnitus, stating Claimant's exposure to noise from drag racing and other nonoccupational activities was comparatively insignificant. Dr. Ator, on the other hand, thought Claimant's noise exposure from his hobbies was the major contributor to Claimant's hearing loss, along with Claimant's prior employment, but Dr. Ator understood Claimant participated in motorcycle and drag racing every weekend, all

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[4] Ator Depo., Ex. 4.

[5] Ator Depo. at 8.

[6] Ator Depo. at 31.

> day long, for three to ten years, and understood Claimant worked for Respondent for twelve years, not twenty-three years. Ordinarily, Dr. Ator's qualifications and examination procedure would entitle him to great deference, but Dr. Ator's opinions are premised on an incorrect understanding of the amount of noise exposure Claimant faced outside of work and during his working life. Dr. Bieri's opinions are premised on a more accurate history of Claimant's occupational and non-occupational noise exposure. Therefore, the Court finds the opinions of Dr. Bieri more credible than those of Dr. Ator, and finds Claimant's exposure to noise while working for Respondent was the prevailing factor causing his bilateral hearing loss and tinnitus. Claimant met his burden of proving he met with personal injury from repetitive trauma arising out of and in the course of his employment with Respondent.
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> . . .
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> The next issue is whether Claimant is eligible to receive permanent partial disability compensation for his bilateral hearing loss and tinnitus. Under the Kansas Workers Compensation Act, bilateral hearing loss is treated as a scheduled injury with a maximum permanent partial disability benefit period of 110 weeks. K.S.A. 2013 Supp. 44-510d(b)(19). Claimant testified he has difficulty hearing people during conversations, and experiences a constant ringing in his ears. Claimant does not wear hearing aids, but hearing aids have been prescribed and Claimant would like to receive them. Claimant is not currently working, but has not retired and is retraining as a welder. Dr. Bieri rated Claimant's functional impairment at 6% of the body as a whole, and explained his methodology under the *AMA Guides*. Dr. Ator rated Claimant's functional impairment at 9% of the body as a whole without explanation. Consistent with the prior finding that Dr. Dr. Bieri's opinions have greater weight than those of Dr. Ator, the Court adopts Dr. Bieri's opinion on permanent impairment, and finds Claimant sustained functional impairment of 6% at the 110-week level for his bilateral hearing loss and tinnitus.

Claimant appealed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2013 Supp. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) provides,"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."

K.S.A. 2013 Supp. 44-510d states, in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the [medical] compensation . . . .

(b) If there is an award of permanent disability . . . compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(19) For the complete loss of hearing of both ears, 110 weeks.

. . .

(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015 . . . .

(c) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except [medical] benefits . . . and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability . . . .

K.S.A. 2013 Supp. 44-510e(a) states, in part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

. . .

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury.

Board review of a judge's order is de novo on the record.[7] On such review, the Board makes its own factual findings[8] and is as capable as a judge to review the evidence.[9]

The trier of fact must decide the nature and extent of injury and which testimony is more accurate and/or credible and may adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability.[10]

The Board adopts the judge's well-reasoned opinion concerning causation and compensability. Dr. Ator was under a mistaken impression regarding the extent of claimant being exposed to noise outside of work and the duration claimant worked for respondent.

However, we modify the award of PPD benefits. Both ratings are equally credible. Dr. Ator's opinion concerning impairment is not affected by his fallacious opinion regarding causation. Therefore, claimant sustained a 21.75% binaural hearing loss. We agree with the parties' stipulation that PPD benefits should be based on ear impairment and not determined only after converting claimant's impairment to the body as a whole. Typically, impairment percentages for scheduled body parts are reduced when converted to whole body impairment percentages. Claimant is limited to the 110 weeks available under the schedule based on his ear impairment and not for whole body impairment based on a whole body rating. To reduce his impairment percentage based on a whole body injury, while limiting him to 110 weeks, artificially devalues his PPD benefits.

CONCLUSIONS

1. Claimant proved compensable injury by repetitive trauma involving his ears, as detailed in the judge's Award.

2. Claimant sustained a 21.75% binaural hearing impairment to be calculated based on the 110 week schedule.

3. All other aspects of the judge's Award not specifically commented upon are left unaffected.

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[7] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995). The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions made by the judge. See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[8] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[9] See *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 343 P.3d 114 (2015).

[10] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 1, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute*.

AWARD

WHEREFORE, the Board affirms in part and modifies in part the November 12, 2015 Award. Claimant's injury is compensable and he is entitled to PPD benefits based on a 21.75% binaural hearing impairment. All other aspects of the judge's Award are left unaffected.

The compensable weeks are computed as follows: 110.00 weeks on the schedule multiplied by a 21.75% impairment = 23.93 weeks of PPD benefits. Therefore, claimant is entitled to a total award of 23.93 weeks of PPD compensation, at the rate of $587 per week, in the amount of $14,046.91 for a 21.75% loss of use of hearing for both ears.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
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Honorable William G. Belden